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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	

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JOINT REPLY COMMENTS OF THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA THE ELECTRONIC MESSAGING ASSOCIATION THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL THE INFORMATION INDUSTRY ASSOCIATION THE NATIONAL RETAIL FEDERATION

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SUMMARY OF POSITION

The parties to this proceeding agree that universal service should be limited to the five core services identified by the Notice. These services are more than adequate to ensure that all Americans are capable of participating in, and enjoying the benefits of, the Information Age. The Commission should therefore reject calls to include services such as ISDN, T1 lines, frame relay, asynchronous transfer mode and similar telecommunications services -- to which even many businesses do not subscribe -- within the definition of universal service.

The Commission should also emphatically reject the suggestion that universal service be expanded to include information services. Expanding the definition of universal service to include unregulated enhanced services would be totally inconsistent with the plain language of the 1996 Act, which defines universal service as "an evolving level of telecommunications services." As the Act and its legislative history make clear, "information services" are not "telecommunications services." It is for this reason, among others, that universal service should not include Internet access. As used and understood by the on-line information services community, Internet access entails protocol conversion and information storage and, as such, is an enhanced service within the meaning of the Commission's rules. As a consequence, it cannot be included within the definition of universal service.

The record of this proceeding also makes clear that operators of private networks and non-carrier providers of interstate telecommunications should not be required to contribute to universal service, other than through the payments they make to telecommunications carriers. None of the parties that have suggested otherwise has given any reasons for doing so. Indeed, in the case of private networks, they have not identified the source of the Commission's

authority to do so. Also without merit and legal authority are the suggestions that information service providers should be required to contribute to the support of universal service pursuant to Section 254(d) of the Act. The definitions adopted by the 1996 Act, together with the underlying legislative history, make clear that information services are neither "telecommunications" nor "telecommunications services." As a consequence, information service providers cannot be characterized as either "telecommunications carriers" or any "other provider of interstate telecommunications," and thus may not be required to contribute to universal service pursuant to Section 254(d) of the Act.

Given the clear definitional framework of the Act, the Commission should reject LDDS Worldcom's argument that some enhanced services are telecommunications services and therefore subject to the universal service support obligations of Section 254. The Commission should also reject, as misplaced, LDDS Worldcom's concerns about providers of Voice-Over-Net services. Contrary to LDDS Worldcom's apparent belief, there are few, if any, "providers" of Voice-Over-Net services. Rather, individual Internet users purchase special purpose software that enables them to send voice over the Internet.

The Commission should also reject USTA's suggestion that information services be separated into transmission and non-transmission components and that a universal service support contribution be assessed on the revenues attributable to the transmission component. As the Commission and the courts have repeatedly found, enhanced services are inseverable.

The commenting parties overwhelmingly agree that all implicit subsidies should be removed from interstate access charges. As the parties recognize, this must be accompanied by the reform of the Commission's jurisdictional separations and access charge rules. Such

reforms, however, need not result in an increase in the SLC or the imposition of a surrogate charge. If universal service subsidies were made explicit and based on true economic cost, the funds needed to support universal service would be substantially less than today's jumble of hidden subsidies.

The parties to this proceeding also agree that a single, non-governmental entity -- rather than the states or NECA -- should administer universal service support finds.

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JOINT REPLY COMMENTS OF THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA THE ELECTRONIC MESSAGING ASSOCIATION THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL THE INFORMATION INDUSTRY ASSOCIATION THE NATIONAL RETAIL FEDERATION

The Information Technology Association of America ("ITAA"), the Electronic Messaging Association ("EMA"), the Information Technology Industry Council ("ITI"), the Information Industry Association ("IIA"), and the National Retail Federation ("NRF") (collectively, the "Joint Commenters") hereby reply to the comments that were filed in response to the Commission's Notice of Proposed Rulemaking and Order Establishing Joint Board ("Notice") in the above-captioned proceeding on April 12, 1996.[1]

I. INTRODUCTION

ITAA and EMA, in their initial joint comments, and ITI, IIA and NRF, in their separately submitted initial comments, all endorsed the Commission's tentative conclusion that the concept of universal service should be limited to voice grade access, touch tone service, and single-party service, as well as access to 911 and operator services. The Joint Commenters

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[1] Federal-State Joint Board on Universal Service, FCC 96-93, CC Docket No. 96-45 (released Mar. 8, 1996) [hereinafter "Notice"].

cautioned that the list of "core" services qualifying for universal service support should not be enlarged to include other basic telecommunications services absent some compelling public interest showing. The Joint Commenters also explained why the definition of universal service should not, under any circumstances, be expanded to include unregulated enhanced (information) services.[2]

In addition, the Joint Commenters urged the Commission to: (1) implement fully the requirement of the Telecommunications Act of 1996 ("1996 Act") that universal service subsidies be made "explicit" by eliminating all such subsidies from interstate access charges; (2) devise a new universal support mechanism that collects subsidies on an equitable and nondiscriminatory basis from all telecommunications common carriers; (3) either not require Section 254 universal service contributions from "other provider[s] of telecommunications" or limit such contribution to facilities-based providers; (4) make clear that purely private networks are not required to make universal service contributions pursuant to Section 254; and (5) appoint a single, non-governmental entity to administer the collection and distribution of universal service support payments.

Upon review of the comments filed by other parties, ITAA, EMA, ITI, IIA and NRF have decided to file joint reply comments. Their purpose in doing so is to impress upon the Commission the shared views of the Nation's principal providers and users of information services with respect to the universal service issues raised by the Notice. (They are also mindful of the Commission's admonition that parties with like interests file jointly.) Collectively, the Joint Commenters represent more than 13,000 companies. Together, they spend hundreds of

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[2] The terms "enhanced services" and "information services" are used synonymously herein.

millions of dollars each year on basic telecommunications services and are thus major contributors to the support of universal service.

As set forth below, the record of this proceeding overwhelmingly supports the Commission's tentative conclusion to limit universal service to a core group of basic telecommunications services. The Commission should reject the suggestions advanced by some to expand universal service to include other basic services. The Commission should also reject out of hand any suggestion that universal service be expanded to include unregulated information services.

The record also makes clear that only telecommunications carriers should be required to contribute to the support of universal service pursuant to Section 254 of the Act. Unregulated enhanced service providers, operators of private networks, and non-carrier providers of interstate telecommunications should not be required to support universal service other than through the payments they make to telecommunications carriers. The majority of commenters also agree that all subsidies should be removed from interstate access charges and that a single, non-governmental entity should be designated to administer universal service support programs.

II. THE RECORD SUPPORTS LIMITING THE DEFINITION OF UNIVERSAL SERVICE TO THE CORE SERVICES IDENTIFIED BY THE NOTICE, WITH THE POSSIBLE ADDITION OF DIRECTORY ASSISTANCE, WHITE PAGE LISTINGS, AND EQUAL ACCESS TO INTEREXCHANGE CARRIERS

Most of the major industry players participating in this proceeding, as well as most state public utilities commissions, agree that universal service should be confined to a

limited number of "telecommunications services."[3] Although some of these parties have proposed modest additions to the Commission's five "core" services (e.g., directory assistance, white page listings, and equal access to interexchange carriers), none has recommended the inclusion of non-telecommunications services such as enhanced services. Even the National Association of State Utility Consumer Advocates ("NASUCA"), a sophisticated public interest organization, endorses the Commission's core list of services, with the addition of white page listings, directory assistance, and equal access to interexchange carriers.[4]

None of the commenting parties seriously disputes that the five "core" services identified by the Notice are more than adequate to ensure that all Americans are capable of fully participating in the Information Age. In this regard, Sprint correctly notes that there is no sound public policy justification for expanding the definition of universal service to include other basic services to which even many businesses do not subscribe:

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[3] For local exchange carriers and cellular carriers, see, e.g., Comments of Airtouch Communications at 10, 14; Comments of Ameritech at 6-7; Comments of Bell Atlantic at 7; Comments of BellSouth at 5-6; Comments of Cincinnati Bell at 4; Comments of GTE at 2; Comments of NYNEX at 1-2; Comments of United States Telephone Association ("USTA") at 4. For cable companies, see, e.g., Comments of National Cable Television Association ("NCTA") at 5-6; Comments of Time Warner Communications at 3-4. For interexchange carriers, see, e.g., Comments of Competitive Telecommunications Association at 6; Comments of MCI at 9; Comments of Sprint at 6-8. For federal agencies, see, e.g., Comments of U.S. Small Business Administration at 5-6; Comments of General Services Administration at 7. For state public utilities commissions, see, e.g., Comments of Florida Public Service Commission at 6-8; Comments of New York State Department of Public Service at 12-13; Comments of Texas Public Utility Commission at 8. For information technology companies, see, e.g., Comments of Netscape at 13-14; Comments of Information Industry Association ("IIA") at 3; Joint Comments of Information Technology Association of America ("ITAA") and Electronic Messaging Association ("EMA") at 4-10.

[4] Comments of NASUCA at 17-18.

> It is critical that only services that a majority of consumers have subscribed to be funded because ultimately it is the consumer that funds the subsidy. If services are supported that a majority of consumers have not subscribed to, then consumers in high cost areas receive subsidies for services that are unwanted by the majority of consumers, the very group that ultimately funds the subsidy. Such a result is unwarranted and contrary to the idea of lessened regulatory burdens and increased competition with its associated freedom of choice.[5]

The Commission should therefore reject calls to include such telecommunications services as ISDN,[6] high-speed T1 lines, frame relay, asynchronous transfer mode ("ATM"), and similar telecommunications services within the definition of universal service.[7] Plainly, these services do not meet the requirement of Section 254(c)(1)(B) that a service be "subscribed to by a substantial majority of residential customers" before it can be included in the definition of universal service.

The Commission should also emphatically reject the suggestion that universal service be expanded to include unregulated information services, such as Internet access, voice

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[5] Comments of Sprint at 8. See also Comments of NCTA at 5 ("Expanding the list to include other services could act as a barrier to entry for competing LECs ('CLECs') because it may force unwarranted subsidies onto competitors or give incumbent LECs control over an even greater number of essential elements of the local exchange."); Comments of Citizens Utilities at 4 ("Viewing the new statutory universal service policy as a 'Christmas tree' to accommodate any possible desire for telecommunications services . . . would impose an impossible social burden upon the telecommunications industry.").

[6] See, e.g., Comments of Western Alliance at 12 & n.22; Comments of Evans Telephone et al. at 13 n.9.

[7] See, e.g., Comments of Access to Communications For Education Coalition ("ACE") at 7; Comments of Library of Michigan at 4.

mail, and electronic mail.[8] As ITAA and EMA demonstrated in their initial comments, expanding the definition of universal service so as to include unregulated enhanced services would be totally inconsistent with the 1996 Act's definition of universal service.[9] New Section 254(c)(1) of the Communications Act unambiguously defines universal service as "an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services."[10]

The 1996 Act and its legislative history make quite clear that Congress intended to "exclude[] those services, such as interactive games or shopping services and other services involving interaction with stored information, that are defined as information services"[11] from the definition of "telecommunications" and "telecommunications service." "Information services" are therefore not "telecommunications services" within the meaning of the Act. As a consequence, the Commission need not consider whether specific information services should

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[8] See, e.g., Comments of Kinko's (passim) (advocates giving vouchers to consumers so that they can access and utilize Internet information); Comments of Ohio Public Utilities Commission at 9; Comments of ACE at 6-7; Comments of Library of Michigan at 4.

[9] Joint Comments of ITAA and EMA at 4-10.

[10] 47 U.S.C. § 254(c)(1) (emphasis added).

[11] S. Rep. No. 23, 104th Cong., 1st Sess. 17-18 (1995) (emphasis added). In the conference report accompanying the 1996 Act, Congress accepted the Senate's definition of "telecommunications," which excluded information services. See H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 116 (1996) ("The House recedes to the Senate with amendments with respect to the definition[] of . . . 'telecommunications.'"). For additional legislative analysis of the 1996 Act, see Joint Comments of ITAA and EMA at 4-10; Comments of ITI at 5-7; Comments of Interactive Services Association ("ISA") at 6-9; Comments of Netscape at 13-14.

be included within the definition of universal service. The 1996 Act does not authorize the Commission to define universal service so as to include information services.

One information service, however. does merit discussion. In their comments, a number of parties have recognized the distinction between providing information services themselves and providing "access" to such services.[12] As the Commission appears to have recognized, access to information services can be achieved using voice grade lines and touch tone service, two of the core services identified by the Notice as elements of universal service. There is, however, another form of access, i.e., Internet access, which is itself an information service. Because there is no commonly understood or broadly accepted definition of Internet access, it has created some confusion in the comments. Thus, for example, commenters such as the Alaska Public Utilities Commission, Pacific Telesis, and US WEST suggest that Internet access can be provided, without more, through local dial-up access or high-speed data lines.[13] Simply stated, these commenters are mistaken. Internet access, as used by the on-line information services community, has a far different meaning.

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[12] See, e.g., Comments of Pacific Telesis at 5 ("Under the Act, telecommunications providers fund access to the network and connections within the schools. A different funding mechanism must be designed for the remainder of the components needed for a successful program.") (emphasis in original); Comments of Competitive Telecommunications Association at 6; Joint Comments of ITAA and EMA at 10; Comments of IIA at 3; Comments of ITI at 11.

[13] See Comments of Alaska Public Utilities Commission at 2 (Internet access involves local-dialing access); Comments of Pacific Telesis at 4 (Internet access involves the provision of 128 kbps ISDN lines); Comments of US WEST at 22-23 (Internet access involves the provision of 56 kbps circuits and toll-free dial-up access).

As the Interactive Services Association has explained in its comments, Internet access includes protocol conversion and information storage, both of which are unregulated enhanced services within the meaning of the Commission's rules:

> Internet access service is not a telecommunications service . . . that permits transmission of information of the user's choosing . . . . Instead, companies providing Internet access service provide their subscribers with computer storage capacity and Internet communications protocols, which can be thought of as a kind of information that only computers can understand and use. . . . Nor is the information provided by an Internet access provider offered between points of the user's choosing. Just as with online service, Internet access service operates on a client-server model. The user may choose the client end of the communications path but has no choice about the server end. . . . Finally, transmissions between the user and the Internet service provider are not such that the form or content of the information is unchanged. Information on the Internet is stored in as many different formats as there are kinds of computers. Exchanging text files between all these different computers requires conversion into different forms. Thus, the "ftp" program -- the basic method of moving file-structured information over the Internet -- must perform end-to-end conversion of text files between client and server.[14]

Thus, to the extent that Internet access includes such features as protocol conversion and information storage, it is an enhanced or information service. As such, it cannot be included within the definition of universal service.

The Commission should therefore reject the comments of Kinko's and others that Internet access be made part of universal service.[15] In addition to being an information service, Internet access does not satisfy the criteria set forth in Section 254(c)(1) to be included in

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[14] Comments of ISA at 8-9. See also Comments of CompuServe at 11.

[15] See, e.g., Comments of Kinko's (passim); Comments of ACE at 6-7; Comments of Library of Michigan at 4; Comments of Alaska Public Utilities Commission at 2.

universal service.[16] Moreover, Kinko's proposal to use universal service funds to provide consumers with Internet vouchers -- to be paid to companies such as Kinko's -- would improperly subsidize not only Internet access, but also Internet subscription services and CPE such as computers, modems and printers.[17] The 1996 Act plainly does not contemplate such grandiose schemes.

The Joint Commenters, however, are not insensitive to the needs of schools, libraries, and other segments of the public for information services. To the extent that there is a demand for these services, the Joint Commenters agree with Apple Computer and Netscape that a competitive marketplace will be the best vehicle to ensure their low-cost and widespread availability. For example, Apple, through its Apple Classrooms of Tomorrow technology research group, has voluntarily provided schools with computers and other high-tech teaching aids.[18] As Apple points out, such private sector initiatives should be allowed to continue without governmental interference:

> The Commission should recognize the substantial benefits provided by robust competition in the computer and information services markets and should avoid any impulse to regulate these markets in an effort to promote access by schools and libraries to advanced information services. Such regulation not only would be counter-

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[16] Kinko's conclusory assertions that Internet access meets the criteria of Section 254(c)(1) are unsupported and should be rejected. See Comments of Kinko's at 7.

[17] See Comments of Kinko's at 11-12 ("Community Internet Access Centers . . . would offer the public computers, modems, and printers for Internet Access. Internet Access vouchers could be distributed to qualifying consumers who could use them . . . at the Community Internet Access Centers.") (emphasis added).

[18] Comments of Apple Computer at 1.

> productive, but also would be inconsistent with the intent of the 1996 Act.[19]

In addition to the efforts of Apple, the marketplace has spawned several other voluntary programs. One such program is aimed at helping the economically disadvantaged by providing them with access to voice mail.[20] The Joint Commenters fully support such voluntary programs.

Including information services such as Internet access or voice mail in the definition of universal service would pose costly implementation problems and would adversely affect competition in the information services industry. To begin with, it would be extremely difficult to ensure that any universal service subsidies were properly targeted or used, because information services are, by definition, not subject to common carrier or public utility regulation by the Commission or the states. As a consequence, there are no cost data upon which to base subsidies. In addition, by subsidizing a particular information service, the Commission would necessarily be favoring one technology over another because information services can be provided in many different ways. By subsidizing only one technology in a given market, the

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[19] Id. at 8. See also Comments of Netscape at 12 ("Universal service policy can best achieve the objectives of the Act by promoting the growth of the Internet under the existing non-regulated market structure. . . . [I]t would be extremely unwise as a policy matter for the Commission to intervene in the autonomous, efficient self-administration of the Internet.").

[20] See Comments of US WEST at 7 n.12 (describing Project Hope Box which provides unemployed individuals with voice mail capability); Comments of Ameritech at 8 n.15. See also Comments of ITAA, Amendment of the Commission's Rules and Policies to Increase Subscribership and Usage of the Public Switched Network, CC Docket No. 95-115, at 6 (filed Sep. 27, 1995) (competition and innovation spurred by nonregulation of enhanced services have driven down the price of voice mail and made it increasingly affordable for schools, churches, and other public service organizations to provide voice mail services to their constituents).

Commission would necessarily skew competition and disrupt normal market forces. Similarly, because only telecommunications carriers are entitled to receive universal service support payments, subsidizing information services would give telecommunications carriers an insurmountable and unfair competitive advantage over non-carrier providers of information services.

The Commission should therefore adopt a definition of universal service that is limited to the five core services identified by the Notice.

III. THE RECORD MAKES CLEAR THAT UNREGULATED ENHANCED SERVICE PROVIDERS, OPERATORS OF PRIVATE NETWORKS, AND NON-CARRIER PROVIDERS OF TELECOMMUNICATIONS SHOULD NOT BE REQUIRED TO CONTRIBUTE TO UNIVERSAL SERVICE OTHER THAN THROUGH THEIR PAYMENTS TO TELECOMMUNICATIONS CARRIERS

In their initial comments, ITAA, EMA, ITI, ITA, and NRF explained why the obligation to contribute to universal service should be limited to telecommunications carriers. The majority of commenters expressed similar views.[21] ITAA, EMA, ITI, IIA, and NRF also explained why private networks and "other providers" of interstate telecommunications should

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[21] For local exchange carriers, see, e.g., Comments of Bell Atlantic at 14; Comments of BellSouth at 15; Comments of NYNEX at 24 & n.39; Comments of Southwestern Bell at 20. For interexchange carriers and competitive access providers, see, e.g., Comments of Telecommunications Resellers Association at 4-8; Comments of MCI at 15-16; Comments of MFS Communications at 23-24. For state public utilities commissions, see, e.g., Comments of Florida Public Service Commission at 24; Comments of New York State Department of Public Service at 2, 9-10. For enhanced service providers, see, e.g., Comments of CompuServe at 11-16; Comments of ISA at 5-15; Comments of IIA at 6-7; Comments of ITI at 9-10; Comments of Commercial Internet Exchange Association at 3. For private network operators, see, e.g., Comments of International Communications Association at 4-5; Comments of NRF at 4-5; Comments of OpTel at 2; Comments of UTC at 9.

not be required to make separate contributions, over and above the payments they make to telecommunications carriers, to support universal service.[22] Many other parties agreed.[23]

As NRF aptly pointed out in its initial comments, private networks are not "telecommunications carriers" within the meaning of Section 153(49) of the 1996 Act. Simply stated, operators of private networks are not common carriers nor do they provide service to the public.[24] Rather, these private networks are operated by companies to meet their own internal business needs. None of the parties that have proposed subjecting private networks to the contribution requirements of Section 254 has given any reasons for doing so; nor have they identified the source of the Commission's authority to do so.[25] Moreover, these parties overlook the fact that private network operators, like other users, will contribute to the support of universal service through the payments they make to the telecommunications carriers from which they obtain service.[26]

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[22] Joint Comments of ITAA and EMA at 17-19; Comments of ITI at 9-10; Comments of IIA at 6-7; Comments of NRF at 4-5.

[23] See, e.g., Comments of International Communications Association at 4-5; Comments of MFS Communications 24; Comments of OpTel at 2; Comments of UTC at 9-10.

[24] Comments of NRF at 4. See 47 U.S.C. §§ 153(49),(51).

[25] See, e.g., Comments of America's Carriers Telecommunication Association ("ACTA") at 12; Comments of Hopper Telecommunications at 5; Comments of United Utilities at 5.

[26] See Comments of NRF at 5 ("Operators of private networks already fund USF indirectly through their general use of and subsequent payment for telecommunications services."); Comments of ITI at 9 ("[L]eased line private networks have already been 'taxed' indirectly through rates charged by the underlying facilities provider. Requiring a further, direct contribution from such providers would be double taxation.").

Similarly, none of the commenting parties has given any justification for requiring "other provider[s] of interstate telecommunications" to make contributions pursuant to Section 254(d). More specifically, these parties have failed to explain why other providers of telecommunications -- that do not serve the public -- should be required to make a separate contribution to support universal service that will primarily benefit telecommunications carriers. These parties have also failed to explain what purpose would be served by requiring "other provider[s]" that do not own their own transmission facilities to make such contributions. These providers will have already paid their fair share for the support of universal service through the charges they pay to the underlying carrier. To require double payment would be patently unfair. Similarly, none of the parties has explained what purpose would be served by requiring payments from "other provider[s] of telecommunications" whose contribution to universal service would be de minimis.[27]

A handful of parties also suggest -- for the most part without any reasoning --that enhanced service providers should be required to contribute to the support of universal service (over and above the payments they make to telecommunications carriers).[28] Their suggestions, however, cannot be squared with the plain language of Section 254(d) of the Act, which states, in relevant part:

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[27] For parties in favor of exempting de minimis providers, see Comments of MFS Communications at 23 ("For administrative ease, the Commission should exempt carriers with less than a 1% market share as it presently exempts carriers with less than a 1/2% market share . . . from contributing to the USF."); Comments of U.S. Small Business Administration at 9-11.

[28] See, e.g., Comments of ACTA at 12; Comments of LCI International at 5; Comments of Ameritech at 23 n.35; Comments of Pacific Telesis at 20-21; Comments of Communications Workers of America at 10-11

> TELECOMMUNICATIONS CARRIER CONTRIBUTION. -- Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. . . . Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.[29]

As ITAA and EMA explained in their initial comments, the definitions adopted by the 1996 Act, together with the underlying legislative history, make clear that information services are neither "telecommunications" nor "telecommunications service[s]," as defined by Sections 153(48) and 153(51) of the 1996 Act. As a consequence, information service providers cannot be characterized -- to the extent they are engaged in the provision of information services -- as either a "telecommunications carrier" or any "other provider of interstate telecommunications." Not being telecommunications carriers or providers of interstate telecommunications, information service providers may not be required to contribute to universal service pursuant to Section 254(d) of the Act.

The analysis set forth in the comments of CompuServe and the Interactive Services Association is instructive in this regard. Their comments contain a detailed and comprehensive analysis of the 1996 Act which demonstrates that Congress did not intend

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[29] 47 U.S.C. § 254(d) (emphasis added).

information service providers to contribute to universal service.[30] As explained by CompuServe:

> In formulating the statutory distinction between telecommunications and information services, Congress in effect has confirmed the continued viability of, and desirability for the maintenance of, the Commission's Computer II distinction between regulated providers of basic telecommunication services (who are required to contribute to universal service mechanisms) and unregulated providers of enhanced information services such as online and Internet access services (who are not subject to universal service contribution requirements).[31]

LDDS Worldcom -- one of the few proponents to proffer a justification for its position -- argues that some enhanced services may fall within the statutory definition of telecommunications service.[32] As explained above and in the comments of CompuServe and the Interactive Services Association, LDDS Worldcom's view of the statute is completely without merit: all information services are excluded from the statutory definition of "telecommunications" and "telecommunications service." Thus, to the extent that an entity is

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[30] See Comments of CompuServe at 7-16; Comments of ISA at 6-11. See also Comments of Netscape at 13-14 ("The Act does not currently permit the FCC to impose universal service support obligations on ISPs, OSPs and other Internet service providers, since as 'information service' providers these entities are not subject to the requirement of Section 254(d) . . . .").

[31] Comments of CompuServe at 16 (emphasis in original). Imposing contribution obligations on Internet access and other enhanced services would not only be illegal, it would be contrary to sound public policy. See Comments of Commercial Internet Exchange Association at 3 ("[T]he public interest points strongly against subjecting Internet access to universal service charges that may artificially distort and hinder innovation in this vibrant sector of the American economy and may impede low cost availability of service."); Comments of Netscape at 15.

[32] Comments of LDDS Worldcom at 3.

engaged in the provision of a telecommunications service, it is not providing an enhanced service.

Although not entirely clear, LDDS Worldcom's principal concern appears to be the provision of voice services over the Internet, so-called Voice-Over-Net services. LDDS Worldcom argues that the providers of such services are telecommunications carriers subject to the contribution obligations of Section 254 of the Act. Contrary to LDDS Worldcom's apparent belief, there are few, if any, "providers" of Voice-Over-Net services. Rather, individual Internet users purchase special purpose software that enables them to send voice over the Internet. The Joint Commenters submit that it would be inappropriate to classify these users -- or, for that matter, Internet access providers that have no way of knowing how customers are using their services -- as telecommunications carriers or as providers of telecommunications.

USTA raises an equally specious argument. In its comments, USTA urges the Commission to separate the inseparable. More specifically, it argues that the transmission component of information service revenues should be separated from the non-transmission component and that a universal service support contribution should be assessed based on the transmission component, "if discretely identifiable."[33] The Commission, however, beginning with the Second Computer Inquiry, has repeatedly refused to pursue such an approach with respect to information services. In Computer II, the Commission abandoned its Computer I regulatory regime which attempted to distinguish between computer-based communications services, which were regulated, and computer-based data processing services, which were unregulated. The Commission concluded that the technologies of communications and data

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[33] Comments of USTA at 24.

processing had become so intertwined that it was impossible to draw an "enduring line of demarcation" between them.[34] As the Commission stated:

> After three attempts to delineate a distinction between communications and data processing services and failing to arrive at any satisfactory demarcation point, we conclude that further attempts to so distinguish enhanced services would be ultimately futile, inconsistent with our statutory mandate and contrary to the public interest.[35]

The Commission therefore adopted a new classification system which classifies services as either "basic" or "enhanced." A basic service is defined as a "pure" transmission service that is transparent in terms of its interaction with customer-supplied information. By contrast, an enhanced service is defined as any offering which is "more than a basic transmission service."[36] Although enhanced services rely on the use of basic transmission services, the Commission has concluded that enhanced services are inseverable and should be unregulated in toto:[37]

> From the perspective of the regulator, a major benefit in not classifying services within the enhanced category is that the scope of Commission regulation is focused on those services which are clearly within the contemplation of the Communications Act and which serve as the foundation for all enhanced services. . . . Semantic distinctions are avoided as to whether a given service is data processing, information processing, process control, communications processing, or some other category. As such, the potential for the development of an inconsistent regulatory scheme

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[34] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, 430 (1980) [hereinafter "Computer II Decision"]. See also Computer & Communications Industry Association v. FCC, 693 F.2d 198, 204-05 (D.C. Cir. 1982), cert. denied sub nom., Louisiana Public Service Commission v. FCC, 461 U.S. 938 (1983) [hereinafter "CCIA v. FCC"].

[35] Computer II Decision, 77 F.C.C.2d at 425.

[36] Id. at 420.

[37] Id. at 428.

> to accommodate these services is eliminated; all enhanced services are accorded the same regulatory treatment.[38]

Upon review of the Commission's decision in Computer II, the U.S. Court of Appeals for the D.C. Circuit agreed. Like the Commission, the Court concluded that it would not be feasible to separate enhanced services into regulatable and nonregulatable components. It therefore found that the Commission was correct in not attempting to regulate the transmission component of enhanced services: "We agree with the Commission that even if some enhanced services could be classified as common carrier communications activities, the Commission is not required to subject them to Title II regulation where, as here, it finds that it cannot feasibly separate regulable from nonregulable services."[39]

Given the inseverability of enhanced services, it would be extraordinarily difficult, if not impossible, to identify revenues attributable solely to transmission. The Commission should therefore reject USTA's suggestion to impose a universal service contribution obligation on the transmission component of enhanced services.

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[38] Id. at 429.

[39] CCIA v. FCC, 693 F.2d at 210 (emphasis added). See also Comments of CompuServe at 16 (The 1996 Act's statutory distinction between information and telecommunications services confirms the continued viability of the Commission's Computer II distinction between basic and enhanced services)

IV. THE PARTIES AGREE THAT ALL UNIVERSAL SERVICE SUBSIDIES SHOULD BE MADE EXPLICIT AND REMOVED FROM INTERSTATE ACCESS CHARGES

The commenting parties, including many local exchange carriers, agree that all implicit (i.e., hidden) subsidies should be removed from interstate access charges.[40] One such hidden subsidy is a product of the Commission's jurisdictional separations rules, which allow local exchange carriers ("LECs") to shift a disproportionate share of their costs to the interstate jurisdiction. These misallocated costs subsidize local service by artificially raising interstate access charges and, consequently, the rates for interexchange service. Subsidies based on these misallocated costs are hidden -- i.e., they parade as an accurate allocation of costs between the interstate and intrastate jurisdictions -- and thus violate the express provisions of new Section 254(e) which require that all universal service subsidies be made "explicit."

As MFS has noted, these jurisdictional manipulations result in a "giant 'fuzzball'" that hides costs, distorts competition, and yields uneconomic prices.[41] The Joint Commenters therefore agree with AT&T and others that have suggested that all of these implicit subsidies should be eliminated and replaced with a single, new, and explicit charge for universal service that: (1) is separate from all other telecommunications charges (i.e., not "buried" somewhere

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[40] For local exchange carriers, see, e.g., Comments of Ameritech at 11-12, 21-22; Comments of GTE at 14-16; Comments of Pacific Telesis at 12-15; Comments of US WEST at 4. For interexchange carriers and competitive access providers, see, e.g., Comments of AT&T at 4-7; Comments of MCI at 2-7, 14-15; Comments of MFS Communications at 13-15; Comments of LCI International at 4-5; Comments of LDDS Worldcom at 18; Comments of Sprint at 20. For enhanced service and software providers, see, e.g., Comments of CompuServe at 4-7; Comments of IIA at 5-6; Joint Comments of ITAA and EMA at 10-14; Comments of ITI at 12; Comments of Netscape at 17-18.

[41] Comments of MFS Communications at 9

in service rates); and (2) receives its funding from all interstate telecommunications carriers on a competitively neutral basis (e.g., a percentage of each carrier's revenues attributable to telecommunications services).[42]

In its recent Notice of Proposed Rulemaking in CC Docket No. 96-98, the Commission has recognized the interrelationship between this proceeding, the promotion of local exchange competition, and Part 69 access charge reform. The Commission has therefore declared its intention to address these issues in "a comprehensive, consistent, and expedited fashion."[43] The Joint Commenters applaud the Commission's pronouncements in this regard.

The Joint Commenters, however, are troubled by another of the Commission's statements in CC Docket No. 96-98. There, the Commission also stated that it plans to initiate a separate proceeding to review its existing jurisdictional separations rules, rather than conduct that review as part of other proceedings that are already underway.[44] The Joint Commenters submit that the Commission's jurisdictional separations rules must be addressed now, either in this proceeding, in CC Docket No. 96-98, or in the context of access charge reform. Simply put, universal service subsidies cannot be made explicit,[45] access charges cannot be reformed,

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[42] See, e.g., Comments of AT&T at 7, 9 ("[T]he current system of subsidies needs to be reformed and replaced by a single New Universal Service Fund ('NUSF') with competitively neutral funding.") ("[R]egulators must be able to easily identify the surcharge apart from the service provider's rates.").

[43] See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-182, at ¶ 3 (released Apr. 19, 1996).

[44] Id. at n.7.

[45] The 1996 Act requires the Joint Board to make its recommendations to the Commission regarding universal service within nine months of the date of enactment. 47 U.S.C. § 254(a). In addition, the Commission must complete the universal service proceeding (continued...)